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1875 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000
FACSIMILE: (202) 986-8102

E-MAIL ADDRESS: MICHAEL.MCBRIDE@LLGM.COM
WRITER'S DIRECT DIAL: (202) 986-8050

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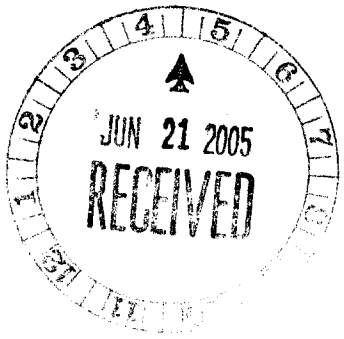
June 21, 2005




**VIA HAND DELIVERY**

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W., 7TH Floor
Washington, DC 20423-00001

Re: BP Amoco Chemical Company v. Norfolk Southern Railway Company, STB Docket No. 42093

Dear Mr. Williams:

Enclosed for filing are the originals and 10 copies of the "confidential" and "public" versions of "Reply Comments of Complainant BP Amoco Chemical Company" in the above-referenced proceeding.

Respectfully submitted,

Michael F. McBride

Michael F. McBride

*Attorney for BP Amoco Chemical Company*

Enclosure

cc (w/encls.): Mr. Tom O'Connor
Mr. Luis M. Sierra
Mr. Jeffrey Foshee
George A. Aspatore, Esq.
G. Paul Motes, Esq.

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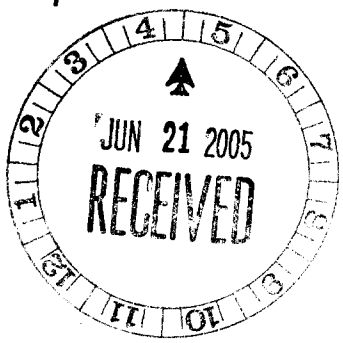


BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket No. 42093

BP AMOCO CHEMICAL COMPANY,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.



# REPLY COMMENTS OF COMPLAINANT BP AMOCO CHEMICAL COMPANY

Complainant BP Amoco Chemical Company ("BP") hereby submits its Reply Comments to the June 16, 2005 Comments ("opening Comments") filed by Respondent Norfolk Southern Railway Company ("NS") in response to the Board's Decision served June 6, 2005 ("June 6 Decision").[1]

1. The Board Should Reject NS's Argument That It Must Make Movement-Specific Adjustments to URCS Costs for Rate-Comparison Purposes. NS argues that the Board must make movement-specific adjustments to URCS for ratemaking purposes, or at least to permit them. The NS suggestion would complicate this proceeding enormously by insisting on making

[1] The Board raised three issues with its previous approaches to the same matters in *Rate Guidelines – Non-Coal Proceedings,* 1 S.T.B. 1004 (1996) ("*Rate Guidelines*"), for purposes of this proceeding. The issues on which the Board requested comments are: (1) changes proposed to implement the calculation of variable costs using only unadjusted Uniform Rail Costing System ("URCS") costs, (2) use of the unadjusted "revenue-shortfall allocation methodology" ("RSAM"), and (3) a process for selecting the comparison traffic group. NS did not comment on the latter two issues. It did raise some additional issues of its own, such as reserving its right to challenge *Rate Guidelines* should BP prevail and the possible indexing of URCS costs. For the Board's convenience, BP addresses those issues as well.

numerous movement-specific changes to URCS costs, even for rate-comparison purposes. NS's position is not correct. The Board must not treat as "costs" things that are clearly not costs (BP opening Comments at 5-6), and must use correct inputs to URCS to derive accurate *unadjusted* URCS costs for rate comparisons (*id.* at 5; NS opening Comments at 4 n.3). However, there is no obligation that the Board make movement-specific adjustments for rate-comparison purposes. The fact that such adjustments would be made to both the issue traffic and the traffic in the comparison group would likely "cancel each other out" (*Burlington Northern R.R. v. ICC*, 985 F.2d 589, 601 (D.C. Cir. 1993); June 6 Decision at 9) is one of the reasons not to follow NS's ill-advised suggestion. Avoiding needless complication of a process that is intended to be simplified is another. The Board is, therefore, on solid ground in proposing to use unadjusted URCS costs for rate comparisons using the "benchmarks" in its *Rate Guidelines.*[2]

NS's ill-advised determination to make movement-specific adjustments to URCS costs, even for rate-comparison purposes, would vastly complicate, make more expensive, and delay what is supposed to be a "simplified and expedited" process. 49 U.S.C. § 10701(d)(3) ("The Board shall...establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case."). To put it colloquially, the Board should not let attempts at achieving "the perfect be the enemy of the good" especially where Congress has decided (in effect) that perfection is not required or appropriate in a proceeding such as this one.[3] It is well

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[2] As BP explained in its opening Comments (at 4 n.5), BP would agree with NS that movement-specific adjustments to URCS would be proper *if and only if* the Board were to adopt some absolute standard for rate reasonableness (e.g., all rates over 250% of variable costs are unreasonable), because in those circumstances the Board would imply that the costs included in such a test must be as accurate as possible. There is no reason to believe that NS will propose or the Board will adopt such an absolute standard here, however, so that exception is likely inapplicable to this proceeding.

[3] The Board stated in *Rate Guidelines:* "There is certainly room for parties to complain that the results of such an analysis are not (and cannot be) either precise or perfect. It has long been recognized, however, that any simplified

to bear in mind that the object of the exercise is to determine whether the rate to be prescribed is within a "reasonable range or zone," *Rate Guidelines,* 1 S.T.B. at 1023.

2. *The Board Should Decline the Invitation to Decide Now That It "Expects" and Will Necessarily Rely on Evidence That Goes Beyond the Board's "Benchmarks" in Its Non-Coal Rate Guidelines.* NS apparently also seeks an advance determination that the Board "expects and will fully consider" other evidence (which it does not define or specify, other than by example, NS opening Comments at 7-9) that goes beyond the "benchmarks" in *Rate Guidelines*, to attempt to prove that the rates at issue are reasonable or unreasonable. The Board already stated in *Rate Guidelines* that its "benchmarks" are a "starting point" (1 S.T.B. at 1022)[4] and the D. C. Circuit dismissed AAR's challenge as unripe in part on that ground. *Association of American Railroads v. STB*, 146 F.3d 942, 946-47 (D.C. Cir. 1999). There is no need to go beyond the Board's stated position now. The Board can accept into the record whatever evidence NS wishes to present at the rate-reasonableness phase of this proceeding, and determine *at that time*, after receiving BP's rebuttal to it, whether to rely on NS's evidence in support of the challenged rate or not.[5] However, without NS identifying the specific evidence it would seek to offer at that time, the Board should not buy a "pig in a poke," just because NS *may* have a right to offer such evidence (depending on the state of the record at that time).

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approach entails a trade-off. The accuracy and precision available under CMP must be sacrificed for the simplicity needed where CMP is unavailable. Thus, all that we can do, where CMP is unavailable, is to make a rough, but reasoned call based on the evidence that is available." 1 S.T.B. at 1023.

[4] Accordingly, BP should be allowed to put on a *prima facie* case under the "benchmarks" alone, if it so chooses.

[5] In *Rate Guidelines,* the Board also stated that "In other words, the analysis that we envision would not presume that, simply because a rate produces an r/vc ratio above an average level, it is thereby unreasonable [footnote omitted]. The nature of an average number – which is produced by combining numbers that are both above and below that level – does not permit such a presumption. Rather what we must consider is whether the resulting markup is within a reasonable range or zone." 1 S.T.B. at 1023.

Ironically, NS's Comments, which contend that the Board should depart from its *Rate Guidelines,* instead demonstrate why the Board should not do so, either on the issue of what additional evidence the parties may offer, or on the issues of whether to permit reliance on the adjusted RSAM levels and on the composition of the proper traffic comparison group, neither of which NS addressed. NS's opening Comments demonstrate why the Board should adhere to its *Rate Guidelines* (except on the issue of use of unadjusted URCS costs) because NS's approach would make *Rate Guidelines* unworkable for any party, given the cost and complexity of NS's proposals. Rather, BP's position, *for purposes of this proceeding,*[6] is that the Board should reconsider its departure in its June 6 Decision from the approach adopted in *Rate Guidelines* with respect to the adjusted RSAM and the traffic comparison group, and follow its *Rate Guidelines* (except on the use of unadjusted URCS costs, for rate-comparison purposes, as the Board proposed in its June 6 Decision, and BP has supported, for reasons of simplicity, cost, and expeditious processing of the small-shipment case).

As BP showed in its opening Comments, the Board, in order to justify a departure from its presumptively applicable *Rate Guidelines,* must "cogently explain why it has exercised its discretion in [the] given manner." *Exxon Corp. v. FERC*, 206 F.3d 47, 54 (D.C. Cir. 2000)(quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983)). It has done so, with respect to the use of unadjusted URCS costs, *for comparative purposes,* for both the issue traffic and the comparison traffic group.

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[6] BP takes the position, for purposes of this proceeding, that the Board should (with the single exception noted) follow its *Rate Guidelines*. Just as NS has decided not to contest BP's eligibility under *Rate Guidelines* for purposes of this proceeding only, the Board should make clear that any decision in this proceeding will not have binding effect on other shippers or other railroads, or in any other proceedings (even those which might involve BP or NS), but rather will be applicable only to the facts of this proceeding. After this proceeding is resolved, all parties may wish to offer views to the Board on how future proceedings should be handled.

However, BP respectfully asserts that the Board has not provided a cogent explanation for departing from the use of the lower end of the "revenue-shortfall allocation methodology" ("RSAM") range. BP also asserts that the STB has not provided a cogent rationale for precluding use of the entire costed Waybill Sample as the "comparison traffic group," particularly if the Board otherwise does not take the Long-Cannon Amendment into account by refusing to use the adjusted RSAM percentages for NS.

As we have already noted, Congress directed the Board "to establish a simplified and expedited method for determining the reasonableness of challenged rail rates in those cases in which a full stand-alone cost presentation is too costly, given the value of the case." 49 U.S.C. § 101701(d)(3). Accordingly, the Board is not only entitled, but obligated, to establish straight-forward guidelines for application in a proceeding such as this, as it attempted to do in its June 6 Decision. NS has a right to present evidence that goes beyond the benchmarks in *Rate Guidelines* if the Board were simply to conclude that a rate is unreasonable because it exceeds an average R/VC level, without "consider[ing] whether the resulting markup is within a reasonable range or zone." *Association of American Railroads v. STB, supra*, 146 F.3d at 947 (citing *Rate Guidelines*).[7] But the Board has not yet applied its benchmarks here, even to determine whether BP has made a *prima facie* case. In balancing the need for accuracy with the Congressional purpose that proceedings such as this not be "too costly, given the value of the case," the Board

[7] BP wishes to advise the Board, as it has counsel for NS on Friday, June 17, 2005, that it used an incorrect value for the average number of tons of paraxylene associated with the transportation at issue in its verified Complaint and previous submissions in this proceeding. BP used [redacted] tons (denominating the weight in metric tons), and therefore so did Mr. O'Connor in his variable-cost calculations. Only in the last few days did BP realize that the correct number of tons is [redacted], using short tons instead of metric tons. Use of the correct number of tons causes some minor changes in the calculation of variable costs, and thus the R/VC ratios, for the transportation at issue, because URCS costs are based on short tons. Use of the correct tonnage figure produces an R/VC ratio for the former contract rate ($[redacted]/car) NS charged BP of approximately [redacted]%, and an R/VC ratio of approximately [redacted]% for the effective common-carrier rate of $[redacted]/car (derived by subtracting the mileage allowance NS has provided of $[redacted]/car from the stated, *pro forma* tariff rate of $[redacted]/car) NS published on May 26, 2005 for the transportation at issue while this proceeding is ongoing. We regret the error.

should decline to issue an open-ended invitation to NS to make this proceeding so complex and expensive that BP and others cannot, as a practical matter, obtain relief. [8]

Accordingly, BP suggests that the Board permit BP to present its case as it sees fit, using only the Board's "benchmarks" in *Rate Guidelines* if it wishes, or to go beyond them if it so chooses. (If BP's case were limited to evidence demonstrating that the rates at issue exceed the "benchmarks," that would by definition be sufficient to make a *prima facie* case, because those "benchmarks" are the Board's stated rate guidelines for non-"stand-alone cost" proceedings.) If BP does not present evidence that goes beyond a showing under the Board's "benchmarks," NS should be required to show why the resulting markup BP proposes for the rates to be prescribed are not "within a reasonable range or zone." *Association of American Railroads v. STB*, 146 F.3d at 947 (citing *Rate Guidelines).* In that manner, the Board would allow BP's evidence to constitute the "starting point for a rate reasonableness analysis, not the end result." *Id.* Only if NS can show that the rate level which BP contends is the maximum reasonable rate that should be charged for the traffic at issue is not "within a reasonable range or zone" should the Board allow NS to complicate the proceeding by offering evidence on other factors. This would be consistent with *Rate Guidelines* and its affirmance by the D. C. Circuit, in that it would balance

[8] NS also seeks to adjust 2003 URCS costs to a 2005 cost level. NS Comments at 4. BP does not necessarily object to such an adjustment, but contends that the Board must not use the unadjusted Rail Cost Adjustment Factor (RCAF(U) for that purpose. By definition, railroad input prices are not a measure of a railroad's costs; it is only when input prices are adjusted for productivity that such a measure reflects the actual costs of the incumbent railroad. 49 U.S.C. § 10708(b); *Railroad Cost Recovery Procedures – Productivity Adjustment,* 5 I.C.C.2d 434 (1989), *aff'd sub nom. Edison Electric Inst. v. ICC,* 969 F.2d 1221 (D.C. Cir. 1992). The Board has used RCAF(U) for indexing the hypothetical costs of the "stand-alone railroad" in "stand-alone cost" proceedings, on the theory that a new railroad would not experience the same level of productivity as an incumbent railroad. That theory (to which BP does not necessarily subscribe) nevertheless reinforces the use of the actual costs of the incumbent railroad – NS – in its decisions in this proceeding. Use of NS's actual unit costs may well produce lower costs in 2005 than in 2003, because of the efficiency gains experienced by NS in recent years; indeed, its unit costs appear to have declined substantially in 2004 as compared to 2003. However, after due consideration of these issues, the Board may conclude that it need not index NS's costs for rate-comparison purposes, on the same ground that it concluded that it need not make movement-specific adjustments to URCS costs – because to do so would require it to do so as well for the traffic comparison group, and the effect of indexing both would likely "cancel each other out," *Burlington Northern R.R.,* 985 F.2d at 601, while only making the process more complicated and expensive.

the Congressional requirement of simplification and expedition with the opportunity, *if appropriate,* for each party to present evidence other than with respect to the "benchmarks." (If the Board were to allow NS to present such other evidence, BP of course should be allowed an adequate opportunity to rebut it, and to submit other evidence BP might regard as relevant.) The Board's intended simplification of the process would not long survive needless expansion of the evidentiary scope such as NS has proposed.

## Conclusion

The Board should (1) use unadjusted URCS variable costs for purposes of making rate *comparisons* under its Guidelines for Non-Coal Proceedings, while allowing either party to show that incorrect inputs were made to URCS costs presented by the other party or that the other party has claimed as "costs" things that are not in fact costs, and (2) otherwise adhere to its *Rate Guidelines* in this proceeding, unless either party can demonstrate that it is necessary to depart from them to determine the maximum reasonable rates that are to be applicable to BP's traffic at issue.

Respectfully submitted,

Michael F. McBride

Michael F. McBride
Brian D. O'Neill
LeBoeuf, Lamb, Greene & MacRae, L.L.P.
1875 Connecticut Avenue, N.W.
Suite 1200
Washington, D.C. 20009-5728
(202)986-8000

*Attorneys for BP Amoco Chemical Company*

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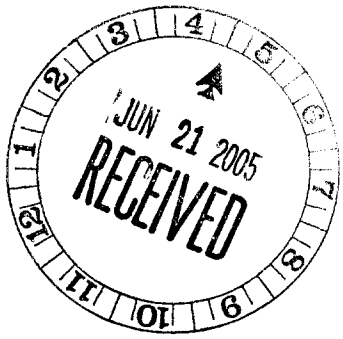
SURFACE TRANSPORTATION BOARD




STB Docket No. 42093

BP AMOCO CHEMICAL COMPANY,
Complainant,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

**CERTIFICATE OF SERVICE**

Pursuant to 49 C.F.R. 1111.3, I hereby certify that I have served, this 21st day of June, 2005, copies of the "confidential" and "public" versions of "Reply Comments of Complainant BP Amoco Chemical Company" by electronic mail, facsimile, or hand delivery, as indicated:

George A. Aspatore, Esq.
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 22510-2191
(Facsimile)

G. Paul Moates, Esq.
Sidley Austin Brown & Wood
1501 K Street, N.W.
Washington, D.C. 20005
(Electronic Mail and Hand Delivery)

Michael F. McBride

*Attorney for BP Amoco Chemical Company*